UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

US EPA RECORDS CENTER REGION 5
514403

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM, INC.; and PHILLIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

v.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

BRIEF ON APPEAL FROM MAGISTRATE'S ORDER DATED AUGUST 14, 1984 SUPPLEMENTING REILLY'S PRIOR SUBMISSIONS ON RENEWED MOTION FOR AN ORDER COMPELLING DISCOVERY

I. INTRODUCTION AND OVERVIEW

Reilly Tar & Chemical Corporation ("Reilly"), the State of Minnesota ("the State"), and the City of St. Louis Park ("the City") have all appealed from the Magistrate's Order of August 14, 1984, relating to objections to questions in five lawyer depositions and four other depositions. The issues raised by these objections have already been set forth in lengthy briefs considered by the Magistrate. It has been agreed that those prior briefs shall be considered by the Court on this appeal, but that the parties to the dispute shall simultaneously file one additional brief directed to the Magistrate's rulings. Reilly is prepared to primarily rely on its prior submissions which set forth the legal and factual justifications compelling answers to deposition questions.[1/]

Reilly would like this brief to serve two functions: (1) to highlight important positions which might

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1/ Reilly relies upon the Revised Memorandum in Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery dated April 20, 1984 (hereinafter "Reilly's Revised Memorandum"); Affidavit of Edward J. Schwartzbauer in Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery dated April 20, 1984; Reply Memorandum of Reilly Tar & Chemical Corporation in Support of its Renewed Motion for an Order Compelling Discovery dated May 25, 1984; and Table of Deposition Questions Submitted in Support of Reilly Tar and Chemical Corporation's Renewed Motion for an Order Compelling Discovery.

otherwise be lost, given the volume of the briefs, and (2) to specifically address the Magistrate's rulings. Since there will be no oral argument on this appeal, this brief will substitute for oral argument and will often refer the Court to Reilly's briefs before the Magistrate.

Reilly sought an order to compel answers to over two hundred questions asked of the various deponents during depositions. Magistrate Boline sustained the objections made by counsel for plaintiffs in response to over eighty of the questions which were asked of the deponents. Reilly objects to the Magistrate's Order, to the extent that it fails to require answers to all of the deposition questions propounded, as being erroneous and contrary to law on grounds that, under the circumstances of this case, either (1) the asserted attorney-client privilege and work product doctrine do not apply to the information sought, or (2) protections that might have been applied have been waived by the City and the State as to information sought during questioning.

This is an unusual lawsuit in many respects. One unusual aspect is that many of the "facts" which need to be developed in discovery and testimony relate to another earlier lawsuit on essentially the same subject matter. One major issue between Reilly and the Plaintiffs-Intervenors is the scope and effect of a settlement in that lawsuit. Since the City claims in its complaint for a declaratory judgment that the settlement does not apply to the groundwater

pollution involved in this case, and that the settlement could not have been broader than the lawsuit itself, the scope of that lawsuit becomes a central issue.

Although we sincerely apologize to the Court for the length of our several presentations, one cannot really appreciate the fundamental unfairness in the State and City positions without a thorough understanding of the overall setting in which the objections on the ground of "privilege" were raised. For example, on the question whether the City and the State were engaged in a common enterprise or whether they were adverse to one another during the years 1973-1978, it is necessary to examine very carefully the many minutes of the Minnesota Pollution Control Agency (hereinafter "MPCA"), and the communications between the MPCA and City officials. In general, those five years witnessed two governmental units in collision with one another. Neither wanted to accept the financial responsibility involved in addressing the perceived problem in St. Louis Park. The evidence shows that the dispute became so hostile that the City threatened to sue the MPCA for its publicity-oriented tactics. And the MPCA director publicly stated that it was looking to the City as the responsible party for removing the contamination. Now, because it suits their present purpose, the City and the State claim that there was no adversity between them.

Since five years of wrangling between the City and the MPCA failed to resolve which of them had the primary responsibility, they decided to try again to place responsibility on Reilly by contending, as they do in this Court, that the 1970 litigation involved only surface, not groundwater. Having decided to side-step the 1970 lawsuit and settlement on the claim that it did not involve groundwater, they now refuse us the right to challenge that claim by questioning the persons who have the best, and most direct, knowledge on the subject.

We would also like to observe at the outset that we don't especially like to cross-examine lawyers who, though they are important witnesses, may also be our adversaries as trial counsel in this case. But lawyers do not have an immunity from giving testimony, though sometimes, as in this case, they act as though they did. It is understandable that they would want to protect their clients and their clients' confidences. At the same time, only the lawyers can explain to the clients that sometimes they are forced to give testimony prejudicial to their clients' case. Because sometimes the truth hurts.

II. MAJOR POINTS

1. With respect to some of Reilly's questions to deponents, the State argues lack of relevance because of this Court's granting summary judgment against Reilly on one of its affirmative defenses against the State - that this dispute was settled as between the State and Reilly. We intend no disrespect

to the Court when we point out on pages 29-32 of Reilly's Revised Memorandum that the Court is not required to consider that Order as a final order. We also point out that virtually all the questions which the State claims are irrelevant because they deal with settlement or agreement by the State, are still relevant in the context of the meaning and scope of the explicit settlement with the City which is the subject of the City's declaratory judgment claim as well as to its cross-claim against the State. We simply do not know the extent to which this Court was able, in the summer of 1983, to review the briefs and supporting materials on Reilly's motion to compel, given the fact that the Court chose not to decide that motion at the time it ruled on Reilly's settlement defense against the State.

It is also important to recognize (though we failed to point this out in Reilly's Revised Memorandum) that the communications between the State and the City are relevant on the question of whether the City relied on representations made by Reilly in entering into the 1972 and 1973 agreements. One of the City's claims is that Reilly defrauded the City in regard to those agreements. One of the elements of actionable fraud is reliance. If the Court will review Wayne Popham's 1974 memo to Eldon Kaul (RTC Ex. 85), Appendix 3 to the Affidavit of Edward J. Schwartzbauer dated April 20, 1984 (hereinafter "A-__"), it will be apparent that there is much available evidence that the City relied upon the State, not Reilly. However, the City and the State attempts to stonewall further questions

on these areas would, if successful, prevent Reilly from completing its discovery on this essential issue.

The matters on which Reilly seeks discovery are relevant to the pending action. The Supreme Court has spoken on the broad meaning of relevancy in the discovery context. Writing for a unanimous Court, Justice Powell stated that "'relevant to the subject matter involved in the pending action' - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Reilly's deposition inquiries clearly meet this liberal test.

2. With respect to the City and the State's refusal to allow the lawyers who represented them to testify regarding their 1970-1973 "understandings" with respect to certain agreements, it is important to remember that the proper focus is not merely whether we are asking for mental impressions. Rather, the focus should be on whether we are asking for mental impressions relating to a trial lawyer's strategies and theories in preparation for trial. For the "work product" objection, properly defined relates only to trial preparation materials. We point this out at pages 36-41 of Reilly's Revised Memorandum. There has never been a rule which protects the understandings or thought processes of office practitioners who draft contracts, or municipal bonds, or wills, or trusts, or deeds, or leases. Rule 26 protects only trial preparation materials. The State's brief misses this point entirely. It totally misreads

Reilly's position and concludes that Reilly must be concluding that the "work product" doctrine only applies to tangible things. Emphatically, Reilly is not so contending.

Reilly is contending that when we ask Mr. Worden his understanding of the words "as is" as they were used in the 1972 Purchase Agreement, or his understanding of the words "any and all claims" in the 1973 Hold Harmless Agreement, we are not asking for trial preparation materials. We are asking about a contract - a settlement agreement. We submit that one of the traditional ways to prepare for any case involving a contract dispute is to interview the lawyers who negotiated the contract to find out what it meant. In such a case, the lawyer's recollection of the intent or purpose for the contract is not a "mental impression" under Rule 26 because it was not a trial preparation material. In this case, the only difference is that some (not all) of the lawyers still represent one of the parties as trial counsel. But the fact that they have chosen to remain as the City's current trial counsel does not change the fact that evidence concerning the intent of the 1972 and 1973 contracts is not part of their trial strategies which are made non-discoverable by Hickman v. Taylor or Rule 26.

3. The lawyers for the State consistently claim that they have the unilaterial right in 1984 to characterize a communication or a document as confidential or privileged, even though it was obviously not intended in 1972 or 1973 as a confidential communication. We point out on pages 32-36 of Reilly's Revised Memorandum that not all communications between attorney

and client are privileged. Only those entrusted to the lawyer which were intended as confidential at the time are considered as privileged. For example, the fact that the scope of the 1970 lawsuit is an issue in 1984, and, therefore, something that the present lawyers would like to keep confidential does not mean that the scope of the lawsuit was confidential in 1970. The 1970 lawsuit could hardly have been tried without revealing its scope to Reilly. Manifestly, the knowledge possessed by Lindall, the State's lawyer in 1972, concerning the negotiations for settlement could not have been considered confidential at the time. In substance, Reilly's lawyer (Reiersgord) communicated an offer to the City and the State jointly; that is, Reilly offers to sell the property if the City and the State will dismiss the case and release Reilly from any further claims. Although he wasn't communicating directly with the State, he intended to communicate with both of them because the City's lawyer represented that he had been authorized to negotiate for the State. Accordingly, we need to know whether Lindall did in fact give Worden that authority, whether Worden communicated Reiersgord's offer to Lindall, and whether Lindall accepted it. Though the State would like to prevent discovery of those facts, it is clear that such communications, if made, would not have been intended as confidential.

Clearly, in the absence of circumstances from which to determine whether the communication was a confidential one, it is the witness himself, not the State's current trial lawyer,

who must tell us of the intent. Yet, when we asked Van de North whether a communication was intended to be confidential, the State's current trial lawyers instructed him not to answer that preliminary question! When we asked Lindall whether, at a certain time, he was working with the City or against the City, the State's current trial lawyers would not allow him to answer that preliminary question!

4. Both the City and the State injected into the case, through the 1978 Lindall, Wikre and Gardebring affidavits, the issue of whether the 1970 action was directed at groundwater. They are joint venturers in an effort to absolve the City of liability under its Hold Harmless Agreement. They maintain that they can deliberately inject this issue in the case, while precluding Reilly's discovery concerning it. As the cases cited on pages 42-44 of Reilly's Revised Memorandum demonstrate, the courts will not allow the attorney-client privilege to be utilized in such an unfair manner. The doctrine of waiver by issue injection effectively strips both the State and the City from any claims of privilege regarding that issue. Accordingly, the Court should rule that irrespective of whether any of the matters about which we inquired would otherwise be privileged, the State and the City no longer have a privilege with respect to the scope of the 1970 lawsuit or the settlement which resulted.

5. Reilly's other claims of "waiver" are based upon the voluntary production of documents. The courts will not countenance a selective waiver. As we point out on pages 44-57 of

Reilly's Revised Memorandum, when enough of a document or a communication is revealed to demonstrate its relevance, the rest of the communication, or questions about the document, must also be revealed or permitted. Here, the word "waiver" is a misnomer because it does not refer to the voluntary relinquishment of a known right. Rather, the concept is that if something is truly confidential, it must be carefully safeguarded. In this regard, the Court should note that Magistrate Boline denied the State's motion for return of privileged documents inadvertently produced, in his Order of June 26, 1984. The State chose not to appeal this Order. The disclosure of a portion of a communication often demonstrates that the remainder is not deserving of protection.

III. MANY OF MAGISTRATE BOLINE'S RULINGS ARE INCONSISTENT WITH HIS APPARENT GENERAL FINDING THAT INFORMATION SOUGHT IS NOT PRIVILEGED OR PROTECTED BY THE WORK PRODUCT DOCTRINE, OR THAT PRIVILEGE HAS BEEN WAIVED

Although Magistrate Boline recognized the inapplicability of the attorney-client privilege and work product doctrine in many situations, there were a number of situations in which he inconsistently applied such reasoning. For example, the Magistrate has ordered Robert J. Lindall, former counsel for the State of Minnesota, who drafted the 1970 State Complaint against Reilly to answer questions concerning whether the conclusions in Reilly Deposition Exhibit 3 (hereinafter "RTC Ex. 3") came to his attention during the course of his duties as counsel for the State at the time he drafted the complaint. Lindall dep. at 32:23-33:9, 36:11-36:22, 44:17-45:2. RTC Ex. 3 is a September 1969 report of Hickok & Associates on the Ground-

water Investigation Program at St. Louis Park. In posing the question to Mr. Lindall, counsel for Reilly was attempting to determine whether Mr. Lindall was aware of the fact that there had been prior complaints in St. Louis Park about municipal wells having a "tarry taste". These questions were posed to determine whether Mr. Lindall was aware of potential groundwater problems at the time that he drafted the complaint, and ultimately to determine whether the intended scope of the 1970 lawsuit included groundwater contamination. In requiring Mr. Lindall to answer these questions, the Magistrate correctly recognized that the intended scope of the 1970 lawsuit is an issue which the State and the City have affirmatively placed in issue, thereby waiving associated privileges. See Revised Memorandum pp. 42-44. However, Magistrate Boline sustained objections to a similar question on RTC Ex. 3 posed to Gary Macomber, counsel for the City who worked on the City's 1970 Complaint against Reilly. Macomber dep. at pp. 8:21-9:4. Mr. Lindall was required to answer whether he was aware of the conclusions found in RTC Ex. 5 in 1970 and whether he was aware of RTC Ex. 5 and 6 at the time he drafted the Complaint. Lindall dep. at 37:12-37:20, 38:5-38:12, 39:6-39:8, 44:17-45:2. A similar question posed to Mr. Macomber was not required to be answered by the Magistrate. Macomber dep. at 9:5-9:12.

Additionally, the Magistrate has ordered that Wayne Popham, who was also counsel for the City at the time the 1970 Complaint was drafted, answer whether he was aware in 1970 that the St. Louis Park consultants had informed the City that there

was phenol in the groundwater and that it posed a potential health hazard. Popham dep. at 8:9-8:13. However, he was not ordered to answer whether he was aware of a similar conclusion found in RTC Ex. 73, a Minnesota Department of Health (hereinafter "MDH") memorandum from the same period. Popham dep. at 11:6-11:16.

Magistrate Boline correctly recognizes, with respect to numerous questions posed, that in order to determine what was settled explicitly by the City when the 1970 lawsuit was resolved the scope of the lawsuit must be ascertained. Since these lawyer draftsmen chose to cast the allegations of their respective complaints in broad terms covering alleged contamination of "waters of the State", it is important to examine these witnesses to determine what knowledge they had of possible groundwater contamination. This is of critical importance given the fact that the State and the City have placed the scope of the State court lawsuit in issue in the present federal action contending that it was not intended to cover groundwater.

Magistrate Boline sustained objections by the State to questions asked of Mr. Lindall on his knowledge of the status of negotiations for the sale of the Reilly property to St. Louis Park and questions relating to whether Mr. Lindall knew in 1971 or 1972 that a purchase agreement was going to be signed between Reilly and the City. Lindall dep. at 132:3-132:8, 140:24-141:7, 141:10-141:15. It is Reilly's position that the status of the negotiations between Reilly and the City for the sale of property were not intended to be confidential or secret; therefore,

no privilege would attach to that information. Additionally, RTC Ex. 18, Minnesota Pollution Control Agency (hereinafter "MPCA") minutes of August 9, 1971, reflects that Lindall disclosed at a public meeting his knowledge of the sale of the property to the City. See RTC Ex. 18, A-7. If any privilege could have attached to the information sought by the questions on the State's knowledge of negotiations, that privilege would also have been waived by the voluntary production of RTC Ex. 85 which documents the discussions between the City and the State concerning the negotiations. RTC Ex. 85 (A-3), pp. 6-10.[2/]

The Magistrate's rulings on Mr. Lindall's knowledge of the status of negotiations for the sale of the Reilly property are incorrect when one takes into account other questions on Lindall's knowledge of negotiations which the Magistrate ordered Mr. Lindall to answer.[3/]

There are also inconsistencies in the Magistrate's rulings concerning the understandings of the parties regarding the State's intentions in issuing a dismissal of the litigation

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2/ It is important to note that in Magistrate Boline's June 26, 1984 Order on the State's motion for return of privileged documents inadvertently produced, the Magistrate determined that RTC Ex. 85 was not a privileged document since there was no common enterprise between the State and the City at the time the document was submitted to the State by the City. The State has not appealed this ruling.

3/ The Magistrate ordered Lindall to answer whether at the time of the December 16, 1970 MPCA meeting with officials from Reilly he was aware that Reilly and the City were negotiating for a possible sale (Lindall dep. at 69:24-69:25); Lindall is ordered to answer whether he knew of the negotiations before he received a July 23, 1971 letter from Thomas Reiersgord, counsel for Reilly (Lindall dep. at 73:18-74:7); Lindall is ordered to answer whether he had an understanding as to what "pending negotiations" were referred to in RTC 16, a July 30, 1971 letter from Gary Macomber to Thomas Reiersgord (Lindall dep. at 78:9-78:16).

as provided in the Purchase Agreement between Reilly and the City, and the City's understanding of whether the State would dismiss the lawsuit.

The State has objected to any inquiry as to the parties' understanding of the State's position with regard to dismissal on grounds that the Court's ruling on the State's motion for summary judgment on Reilly's affirmative defense of settlement with the City. However, virtually all of the questions which were asked of the witnesses which relate to the settlement or agreement by the State to dismiss the lawsuit are still relevant in the context of the meaning and scope of the explicit settlement with the City. See Reilly's Revised Memorandum at 15; Reply Memorandum of Reilly Tar & Chemical Corporation in Support of Its Renewed Motion for an Order Compelling Discovery dated May 25, 1984 (hereinafter "Reply Memorandum") at pp. 1-3. Magistrate Boline appears correctly to accept this reasoning in ordering Mr. Worden, counsel for the City to answer whether at the time the Purchase Agreement was put together he believed that the State would issue a dismissal. Worden dep. at 12:16-12:22. Similarly, Mr. Popham, who also represented St. Louis Park, was ordered to respond as to whether the statement in RTC 85 that "both the City and the Pollution Control Agency expected to dismiss the suit at the time of closing" was a factual statement. Popham dep. at 77:2-77:9. However, the witnesses

were not ordered to answer numerous other questions which dealt with the State's position on dismissal.[4/]

A related area of questioning in which the Magistrate reached inconsistent results deals with the MPCA's knowledge of the fact that by entering into the Purchase Agreement, St. Louis Park assumed responsibility for soil and water contamination. Mr. Worden was not ordered to answer whether at the time of his meeting with Mr. Van de North on June 15, 1973, the MPCA knew that St. Louis Park had taken responsibility for soil and water contamination. Worden dep. at 20:17-21:17. Similarly, Mr. Van de North was not ordered to answer who he expected would be cleaning up the property at the time of his meeting with Mr. Worden. Van de North dep. at 20:13-20:17. However, the Magistrate correctly ruled that Mr. Worden should answer the questions of whether he told the MPCA that the City had taken over responsibility for soil and water contamination, whether Van de

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4/ Worden was not ordered to answer whether the State indicated that they would deliver a dismissal or the basis for the City's belief that the State would issue a dismissal. Worden dep. at 13:11-14:8, 14:9-14:12, 14:14-14:17, 14:22-14:24, 25:25-26:3. Popham was not ordered to answer whether he believed the State of Minnesota would dismiss the lawsuit nor was he required to answer whether the State had advised the City that it would dismiss. Popham dep. at 54:2-54:8, 74:10-74:14, 54:10-54:14, 72:2-72:9. Additionally, Lindall was not required to answer whether he was aware that St. Louis Park had agreed to deliver a dismissal executed by the State and the City or the basis the City had for believing it could deliver a dismissal executed by the State. Lindall dep. at 140:24-141:4, 141:18-142:10, 142:12-142:16.

North had mentioned the necessity of obtaining a proposal from Reilly for eliminating pollution hazards and whether the State expressed objections to accepting the City to do the work rather than Reilly. Worden dep. at 21:19-21:23, 22:21-23:6, 24:19-25:5. Similarly, Van de North was ordered to answer whether he learned that the City had agreed as a part of the property acquisition to be responsible for cleaning up the property and whether he discussed with Worden the City's plans for cleaning up the property. Van de North dep. at 19:14-20:2, 20:4-20:7.

At the time of the meeting between Worden and Van de North on June 15, 1973, there was no common enterprise or joint defense between the State and the City. After the City agreed in April of 1972 to take over the property "as is", it assumed some degree of cleanup responsibility, and the City and the State from that date on no longer shared the same interests in the litigation. The fact that there was no common enterprise is reinforced by the fact that the State did not claim that RTC Ex. 34 (A-5), a letter from Mr. Van de North to Mr. Worden confirming understandings reached at the meeting, was privileged or work product and inadvertently produced in the State's Motion for Return of Privileged Documents Inadvertently Produced which was heard by the Magistrate at the same time as the present motion.

In overruling the objections to the majority of the questions dealing with the responsibility for cleanup, the Magistrate has apparently recognized that questions relevant to the issue of the State's knowledge of, reaction to, condi-

tions for, participation in or refusal to perform under a settlement by issuing a dismissal are highly relevant on several issues which clearly remain in the suit. For example, even if as St. Louis Park contends, the Hold Harmless was only meant to be a substitute for a dismissal by the State, the various reasons for the State's refusal to dismiss, including the unwillingness to dismiss until the City had further studied the alleged pollution and provided the State with a proposal for cleanup as discussed in the Worden and Van de North meeting, the communications of those reasons to St. Louis Park and St. Louis Park's acknowledgement of those reasons and its decision nonetheless to hold Reilly harmless from them bear directly on the intended scope of the Hold Harmless Agreement which was subsequently drafted by St. Louis Park and presented to Reilly.

Reilly respectfully requests that the Court correct the inconsistencies in the Magistrate's rulings sustaining the objections to the above-cited deposition questions.

IV. THE MAGISTRATE FAILED TO RECOGNIZE ALL THE INSTANCES WHERE ALLEGED PRIVILEGE OR WORK PRODUCT WAS WAIVED BY THE VOLUNTARY PRODUCTION OF DOCUMENTS BY THE PLAINTIFFS TO REILLY

Even if one assumes, arguendo, that the information sought by defendant Reilly through questioning was at one time privileged, the plaintiffs have waived their privileges and work protection by the production of documents revealing the substance of such communications. Although the Magistrate for the most part recognized the applicability of waiver, there were a number of instances where he failed to recognize that the information sought by deposition questions had been waived

through the production of various documents by the plaintiffs, or failed to acknowledge the extent of the waiver. When a party makes a voluntary disclosure of part of a privileged communication, the privilege is lost for all communications relating to the same subject matter. Detection Systems, Inc. v. Pittway Corporation, 96 F.R.D. 152, 156 (W.D.N.Y. 1982), Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976); see also, Haymes v. Smith, 73 F.R.D. 572, 576 (W.D.N.Y. 1976).

The most blatant example of waiver of privilege relates to questioning on issues which were revealed in RTC Ex. 85. RTC Ex. 85 is a memorandum prepared by Wayne Popham which summarizes the events leading to the City's settlement with Republic Creosote. RTC Ex. 85 (A-3). This memorandum, reveals information which both the City and the State have claimed is privileged. The memorandum contains information which the plaintiff would undoubtedly characterize as work product, legal strategy and confidences. For example, the memo discusses in detail the City's decision to drop its requirement of indemnity in negotiations for the sale of the Reilly property, reveals the City's view of the status of negotiations between Reilly and the City in a chronological fashion and discusses both the City and the PCA's expectations on dismissal of the suit at the time of closing. RTC Ex. 85, pp. 6-10.

Although Magistrate Boline ruled that RTC Ex. 85 was not entitled to any attorney-client privilege or work product protection because this communication between counsel for the

City and the State was not during a period of common enterprise, he refused to allow questioning of a number of the witnesses on information which was disclosed on RTC Ex. 85. See Order of Magistrate Boline dated June 26, 1984.

For example, Magistrate Boline refused to allow defendant Reilly to question Wayne Popham on the City's decision to drop its requirement of indemnity and to negotiate for the property "as is", although reasons for the decision to drop the indemnification requirement are set forth by Mr. Popham in RTC Ex. 85 which had been produced to Reilly and which the Magistrate ruled was not entitled to attorney-client or work product protection. Popham dep. at 49:23-49:25, 50:2-50:12, 50:14-50:18, 51:17-51:21. Similarly, RTC Ex. 85 reflects numerous communications between the State and the City during the period of negotiation for sale of the property which basically informed the State of the status of negotiations for the sale. RTC Ex. 85, at pp. 6-10, A-3. In spite of this disclosure, the witnesses were not allowed to answer a number of questions which relate to the State's knowledge of the status of negotiations. See Lindall dep. at 132:3-132:8, 140:24-141:7, 141:10-141:16. Macomber dep. at 14.6-14:10. Additionally, although RTC Ex. 85 discloses that at the date the Purchase Agreement was signed, both the City and the PCA expected to dismiss the suit at the time of closing, the witnesses were not allowed to answer many questions which relate to the State's knowledge that St. Louis Park had agreed to deliver a dismissal by the State and the basis for St. Louis Park believing that the State would dismiss.

Lindall dep. at 141:18-241:10, 142:12-142:16, 147:3-147:9. Worden dep. at 13:11-14:8, 14:9-14:12, 14:14-14:17, 14:22-14:24, 22:9-22:12, 22:25-26:3. Popham dep. at 54:2-54:8, 54:10-54:14, 72:2-72:9, 74:10-74:14.

Similarly, at the time of the Van de North deposition, counsel for the State of Minnesota objected to the inclusion of Ex. 34 (A-5) as a part of the record in the deposition. See Van de North dep. at 16:20-17:6. RTC Ex. 34 is a June 15, 1973 letter from Jack Van de North, counsel for the State of Minnesota, to Rolfe Worden, counsel for the City, confirming the understandings reached at a meeting between Van de North and Worden on the status of the action against Reilly.[5/] Magistrate Boline apparently recognized that the meeting was not privileged on grounds of waiver by the production of RTC Ex. 34 or on grounds that there was no common enterprise or joint defense between the City and the State at the time of the meeting, since he allowed extensive questioning on the discussion that took place during the meeting by his rulings compelling Messrs. Worden and Van de North to answer deposition questions on the meeting. In spite of the recognition of no apparent privilege protecting the discussions at the meeting, the Magistrate refused to compel Messrs. Worden and Van de North to answer some of the questions concerning information disclosed in RTC Ex. 34 which was discussed in the June 15, 1973 Worden and Van de North

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5/ Although counsel for the State objected to the inclusion of RTC Ex. 34 in the record at the deposition, the State did not ask for the return of the document in its motion for return of privileged documents inadvertently produced.

meeting. See e.g., Worden dep. at 22:9-22:12; Van de North dep. at 20:13-20:17, 41:8-41:22.

Mr. Lindall was questioned on statements which are contained in RTC Ex. 24, a December 14, 1971 MPCA office memorandum prepared by Larry Anderson reflecting investigation at the Reilly site where Harvey McPhee, Robert Lindall, Ward Barton, Marty Osborn, and Larry Anderson were present. The memorandum identifies questions which were raised during the investigation, conclusions concerning that investigation and recommendations for future actions to be taken to remedy alleged pollution problems at the site. Magistrate Boline sustained objections to questions asked of Mr. Lindall, a participant in the investigation. See Lindall dep. at 117:6-117:15, 117:17-118:13, 120:17-120:23, 122:3-122:8. The basis for the objections to the questions asked of Mr. Lindall were that some of the questions posed to Mr. Lindall were based on understandings about the investigation which were reached without the presence of Mr. Barton from Reilly Tar and Chemical and therefore were privileged under a joint defense or common enterprise theory. However, to the extent that RTC Ex. 24 reflects communications, opinions, conclusions and recommendations reached between the City and the State officials, without the presence of Mr. Barton, any privilege that may have attached to such communications has been waived by the production of RTC Ex. 24 which reflects such communications.

Magistrate Boline also sustained an objection to a question posed to Mr. Lindall concerning conversations with Mr. McPhee of the City regarding the corrective measures that would be necessary after Reilly closed the plant. See Lindall

dep. at 135:15-135:20. Magistrate Boline sustained the objection to this question in spite of the fact that the plaintiff produced two letters from Harvey McPhee to Robert Lindall, namely, RTC Ex. 22, which was written on November 16, 1971 and RTC Ex. 23 which was written on November 19, 1971. In both of these letters Mr. McPhee requested the assistance of the MPCA in determining the specific corrective action which would be necessary after Reilly closed its plant. Magistrate Boline also ruled in his Order of June 26, 1984 on the State of Minnesota's Motion for Return of Privileged Documents Inadvertently Produced, that RTC Exs. 22 and 23 were not entitled to attorney-client or work product protection. In light of this finding, the communications between McPhee and Lindall on corrective measures are not protected and it is unreasonable that Magistrate Boline sustained an objection to inquiry into such communications.

V. DEPONENTS SHOULD BE ALLOWED TO ANSWER QUESTIONS RELATING TO THE SCOPE OF THE 1970 LAWSUIT SINCE BOTH THE STATE AND THE CITY HAVE AFFIRMATIVELY PLACED IN ISSUE THE SCOPE OF THAT LAWSUIT

In order to determine what was explicitly settled by the City when the 1970 lawsuit was resolved, the scope of that lawsuit must be determined. However, Magistrate Boline sustained objections to many questions which were directly aimed at determining the scope of the lawsuit.[6/] Reilly has argued

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6/ The following questions for which Magistrate Boline sustained objections relate to the intended scope of the 1970 lawsuit which the State and the City have affirmatively placed in issue thereby waiving any associated privileges that may have attached to such information: Lindall dep. at 22:5-22:20, 41:6-41:15, 42:25-43:15, 43:17-44:8, 44:10-44:15, 48:9-48:14, 54:10-54:15, 54:17-54:20, 59:16-59:23, 60:22-61:21, 67:9-67:15, 67:17-67:22, 74:9-74:22, 74:23-75:5, 116:1-116:10, 135:1-135:13, 135:15-135:20; Macomber dep. at 8:21-9:4, 9:5-9:12, 10:5-10:15, 10:17-10:20; Popham dep. at 11:6-11:16, 22:17-22:19, 22:21-22:25. Van de North dep. at 38:12-38:16, 38:18-38:23.

that when a party affirmatively places in issue information and communications which are privileged, which in this case is the intended scope of the 1970 lawsuit, the party waives the privilege which may have attached to such information or communciations. Reilly has set forth the legal arguments which support a finding of waiver by issue injection in its prior submitted memorandum in support of its motion to compel deposition testimony. See Revised Memorandum at pp. 42-44. The position of Reilly is that even if one assumes that the attorney-client privilege or work product protection which is asserted by the plaintiffs is applicable to the information sought by questioning during depositions, there is still no valid basis for their assertion in this case.

The City, in its cross-claim against the State, has put into issue the question of what communications, representations and understandings existed betweeen it and the State with respect to the Purchase Agreement, the Hold Harmless Agreement and the settlement of the 1970 lawsuit. The City has also sought a declaratory judgment from this Court alleging that the agreements were never intended by either the City or the State to cover groundwater contamination. The State, apparently concerned that it may also be held to have acquiesced in the settlement, has supported the City's position that the 1970 lawsuit was not intended to cover groundwater. See Affidavits of Sandra S. Gardebring, Dale Wikre attached as Appendices 26, 27 to the Affidavit of Edward J. Schwartzbauer in Support of Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling

Discovery dated April 20, 1984. Thus, the State and the City are presently joint venturers in their attempt to prove to this Court the 1970 lawsuit and the 1972 and 1973 agreements did not involve groundwater.

Furthermore, with respect to the settlement of the 1970 lawsuit, the State has used the factual affidavits of its attorneys to support its position that the State did not settle the 1970 lawsuit against Reilly. See Lindall Affidavit, June 21, 1978, Ex. E to Reiersgord Affidavit of June 23, 1983; Lindall Affidavit, April 20, 1983; John B. Van de North, Jr. Affidavit, April 14, 1983, on file herein. In his 1978 affidavit, Mr. Lindall explicitly stated that his testimony that the State did not settle the lawsuit was made after he had reviewed the file concerning the mat er, including "correspondence, memoranda and attorney notes". He thus testified as to his own recollection, which presumably was refreshed by the documents; and as to his interpretation of those documents. By the State's use of the affidavits of its attorneys which purport to be based on information received as attorneys for their clients, any existing attorney-client privilege is waived. The legal argument setting forth the rationale for the waiver of privilege by use of attorney affidavits was also set forth in Reilly's Memorandum in Support of its Motion to Compel Deposition Testimony. See Revised Memorandum at pp. 21-22, 54-55.

In light of this waiver by affirmatively placing in issue the scope of the 1970 lawsuit, Lindall, Macomber and

Popham, the three people who prepared the original 1970 complaint, should be required to answer questions which addressed the intended scope of the complaint and thus the scope of the 1970 lawsuit.

VI. MAGISTRATE BOLINE INCORRECTLY RULED THAT THE QUESTIONS POSED TO MR. WIKRE ON THE RETENTION OF THE USGS AND PROFESSOR HANS OLAF PFANNKUCH WERE MOOT

During the course of the deposition of Dale Wikre, counsel for Reilly inquired as to whether contracts with the United States Geological Survey ("USGS") were entered into at the initiative of the Attorney General's staff. Wikre dep. at 185:13-187:1. It has been Reilly's position that the claim of the plaintiffs that the USGS was retained for purposes of litigation is incorrect. However, as the deposition of Mr. Wikre indicates, Reilly has been precluded from determining whether the contracts with the USGS were entered into by counsel for the State, or by some non-legal person in the MPCA staff.

The Magistrate ruled that the question posed to Mr. Wikre on the retention of the USGS was moot because the question was answered in the memorandum of the United States Government submitted to the Court on May 23, 1984. That brief states that the United States retained the services of certain employees of the USGS as of January 1, 1981 and that the work which the USGS has done for both United States and the State since that date in connection with this case is considered privileged under Rule 26(b)(3) and (4) of the Federal Rules of Civil Procedure. See Memorandum of the United States in Response to Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling

Discovery dated May 23, 1984 at pp. 2-3. However, the USGS also did groundwater modeling for the State of Minnesota under a contract dated July 1, 1978. On its face, this contract was entered into between the Health Department and the USGS and says nothing about litigation. Reilly should be allowed to inquire as to whether that contract was entered into at the initiative of the attorney general or some other persons at the State, and as to the purpose of the work, in order to determine whether the work of the USGS was actually done in preparation for litigation.

Counsel for Reilly also asked Mr. Wikre who retained Professor Pfannkuch at the University of Minnesota. Wikre dep. at 191:7-192:13. The Magistrate again ruled that this question was moot since it was answered in the memorandum of the United States Government. That memorandum states that Professor Pfannkuch was formally retained in late 1983 as a subcontractor to GCA Corporation, a subcontractor to EPA, and that under his subcontract with GCA, Dr. Pfannkuch is to assist in trial preparation and provide expert testimony in this action. See Memorandum of the United States in Response to Reilly Tar & Chemical Corporation's Renewed Motion for an Order Compelling Discovery dated May 23, 1984, pp. 3-4. However, it is Reilly's belief that Professor Pfannkuch did work for the State of Minnesota before 1983 as a subcontractor of the USGS. In fact, Reilly learned in 1982 that Dr. Pfannkuch was working on this case and found a paper done by one of his graduate students on file at the University of Minnesota, Engineering School library.

See Cohen, G., "Dispersion and Sorption of Hydrocarbons in Aquifer Materials", M.S. Thesis, University of Minnesota (1982).

For these reasons, the questions posed to Mr. Wikre dealing with the retention of the USGS and Professor Pfannkuch by the State of Minnesota have not been fully answered in the memorandum of the United States Government and Mr. Wikre should be required to answer the questions aimed at whether the State of Minnesota retained the USGS and Professor Pfannkuch for purposes other than assistance in trial preparation.

VII. CONCLUSIONS

Based on the foregoing analysis, and Reilly's prior submissions on its motion to compel deposition testimony, the portions of Magistrate Boline's Order which sustain objections to questions posed to the various deponents should be reversed.

DATED: October 12, 1984

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